UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMIEN TEVES DOSTER, Petitioner, v. K. HARRINGTON, Warden, Respondent.	NO. ED CV 10-707-VBF(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner, and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 12-1-10, 2010.

VALERIE BAKER FAIRBANK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAMIEN TEVES DOSTER, Petitioner, v. K. HARRINGTON, Warden, Respondent.	NO. ED CV 10-707-VBF(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on May 11, 2010. Respondent filed an Answer on June 2, 2010. Petitioner filed a Traverse on July 21, 2010.

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BACKGROUND

An Information charged Petitioner with the first degree murder of Damon Mabins, and alleged that, in the commission of the murder, Petitioner personally and intentionally discharged a firearm and proximately caused great bodily injury within the meaning of California Penal Code sections 12022.53(d) and 1192.7(c)(8) (Clerk's Transcript ["C.T."] 43-44). The Information also charged Petitioner with the attempted murder of Melvin Banks and with being a felon in possession of a firearm (C.T. 43-44). The Information further alleged that Petitioner had suffered a prior conviction for which he had served a prison term within the meaning of California Penal Code section 667.5(b) (C.T. 44).

A jury found Petitioner guilty of the second degree murder of Mabins and found true the firearm enhancement allegations (Reporter's Transcript ["R.T."] 424-45; C.T. 165, 167-68). The jury also found Petitioner guilty of having been a felon in possession of a firearm (R.T. 425; C.T. 165). The jury acquitted Petitioner of the attempted murder (R.T. 424-25; C.T. 169). Petitioner admitted the prior prison term allegation (R.T. 428; C.T. 165). Petitioner received a sentence of 43 years to life (R.T. 443-44; C.T. 223-30).

The Court of Appeal affirmed the judgment (Respondent's Lodgment 7; see People v. Doster, 2008 WL 4840984 (Cal. App. Nov. 10, 2008). The California Supreme Court summarily denied Petitioner's petition for review (Respondent's Lodgment 9).

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SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Doster, 2008 WL 4840984 (Cal. App. Nov. 10, 2008). See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state appellate decision); see also 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct").

A. *Prosecution*

On September 2, 2005, Thurman Schisler was working at the In-N-Out Burger restaurant located at the corner of Hemlock Avenue and Pigeon Pass Road in Moreno Valley. Sometime between 11:00 p.m. and 12:00 a.m., a large crowd (30 to 50 people) gathered in the parking lot. Most of the members of the crowd were teenagers or in their early 20's. The police were called, and they dispersed the crowd.

Sometime in the evening of September 2, 2005, Rasheed Muslim met up with [Petitioner] and Shariff Garrett, who were in Garrett's sports utility vehicle (SUV). At that time, Garrett asked Muslim if he had a gun, and Muslim told him no. Muslim got into the backseat of Garrett's SUV. They all drove to a club in Colton but did not go in. They then drove to the Moreno Valley In-N-Out Burger.

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As Muslim, Garrett, and [Petitioner] were walking into the restaurant, they encountered a crowd of young people whom Muslim did not know. Garrett got into a verbal confrontation with someone in the crowd. The man said something about shooting Garrett. Garrett responded, "They didn't stop making guns when they made yours." Garrett started walking back to the SUV; Muslim believed it was to retrieve a gun that Garrett kept in the center console. The man from the crowd screamed to his friends to get a gun.

Garrett leaned into the SUV. Another man then ran up and shot Garrett in the back of the head. Muslim tried to go toward Garrett to help him, but the man shot him in the leg. Muslim ran inside the restaurant. Muslim had no idea about [Petitioner's] whereabouts during or after the shooting.

Schisler was in the back room of the restaurant when he heard at least three "popping" sounds. Schisler then heard employees from the kitchen area screaming. When Schisler entered the kitchen, Muslim was leaning on a wall. Muslim told Schisler he had been shot in the leg. Schisler wrapped the leg and waited for paramedics.

That same night, Damon Mabins and Melvin Banks[1] were driving by the In-N-Out Burger and observed a group of people outside in the parking lot. Mabins slowed down. Just then, Banks observed a Black man chasing after another man, later discovered to be Garrett, who was one of Mabins's friends. Banks saw the man chase Garrett and shoot Garrett in the head. Mabins then told Banks that he might have known the man who had been shot; he wanted to go back.

Banks drove up and stopped either next to or behind Garrett's SUV. Mabins walked up to Garrett, who was lying on the ground. He called to Banks to come over. Mabins bent over Garrett's body. There was no one else near the body.

As they were standing near Garrett's body, [Petitioner] came out of nowhere and shot Mabins. Banks could not recall if [Petitioner] came from inside the truck or a grass area in front of the truck. Banks ran. At trial, Banks admitted that he had told police after the shots were fired at Mabins that he heard a clicking sound from the gun before he ran. He denied he ever told police that [Petitioner] pointed the gun at him when he heard the clicking sound.

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[1] Melvin Banks was in custody at the time of his testimony for attempted murder in a different case.

Maria Sneed was inside the In-N-Out Burger restaurant and heard what sounded like firecrackers outside. Muslim then walked into the restaurant limping. Sneed looked out the window and saw a man shooting another man who was lying on the ground. While the man was lying on the ground, Sneed observed the other man shoot him at least four times. She then saw the shooter run away. Mabins and Garrett ended up lying on the ground 10 feet from each other.

Banks told police officers who spoke with him after the incident that [Petitioner] jumped out of the bushes that were in front of the SUV and shot Mabins. He also told officers that [Petitioner] had pointed the gun directly at him, and he heard a click.

Earlier in the evening, Riverside County Sheriff's Deputy Aron Wolfe had responded to the In-N-Out Burger restaurant to break up a disturbance. Some people in the crowd appeared to be ready to get into a fight, and Deputy Wolfe and other officers ordered them to disperse. The parking lot was cleared.

When Deputy Wolfe returned to the area in response to the shooting, he encountered [Petitioner] at a nearby gas station. [Petitioner] was running, and Deputy Wolfe ordered him to stop. [Petitioner] did not seem agitated and was calm. [Petitioner] told Deputy Wolfe that he was inside the In-N-Out Burger restaurant when he heard a round of

gunshots. When [Petitioner] heard a second round of gunshots, he exited the In-N-Out Burger and started running away to avoid being shot.

[Petitioner] was interviewed by Detective Gary LeClair on September 4, 2005, at the police station. The shoes [Petitioner] was wearing at the interview were matched to shoeprints found in blood at the scene. The blood belonged to Garrett.[2]

An autopsy was performed on Mabins on September 7, 2005. He died as a result of five gunshot wounds. Mabins was shot from a distance of one to three feet. Based on the gunshot wounds, it was conceivable Mabins had been lying on the ground when he was shot, depending upon the location of the shooter.

A .38-caliber gun was found in the center console storage area of the SUV. In addition, .32- and .38-caliber shell casings and live rounds were found at the scene. During the autopsy performed on Garrett, .32-caliber bullets were recovered from his body; .38-caliber bullets were recovered from Mabins['s] body. All of the .32-caliber casings and bullets recovered from the scene were from the

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[2] On rebuttal, the prosecution presented evidence that [Petitioner] lied to police that the shoes he had on during the interview were the ones he wore during the shooting.

same gun. A .38-caliber bullet recovered from Mabins's body during the autopsy matched the .38-caliber gun found in the center console of Garrett's SUV.

B. *Defense*

[Petitioner] testified on his own behalf as follows.[3]

Muslim, Garrett, and [Petitioner] all got together between 10:30 or 11:00 p.m. on September 2, 2005. Sometime in the evening, Garrett wanted to go to the In-N-Out Burger.

When they got to the In-N-Out Burger, Garrett parked near a large crowd of people. As the three of them were walking to the restaurant, Garrett got into an argument with someone in the crowd. When Garrett walked back to his car and leaned in (presumably to get a gun he kept in the center console), he got shot in the back of the head by someone from the crowd. [Petitioner] ran and hid. [Petitioner] came back and got in the truck with Garrett to try to hold him up to stop the bleeding. [Petitioner] found a gun on the seat and picked it up.

[Petitioner] heard footsteps behind him and saw someone walking toward the truck. He panicked. He thought he was

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[3] At the time of the shooting, [Petitioner] was on parole for a conviction of child endangerment.

> going to get killed. [Petitioner] was still holding onto Garrett and dropped him; Garrett fell to the ground. [Petitioner] started shooting. He then threw the gun back in the truck and ran.[4]
>
> [Petitioner] lied to the police after the shooting because he was afraid and confused. He claimed he never saw Banks, even though he told police prior to trial that he saw Banks approach him. [Petitioner] denied that he had been at the In-N-Out Burger during the initial crowd disturbance or that Garrett and Muslim had had a discussion about guns.

(Respondent's Lodgment 7, at pp. 3-8; see People v. Doster, 2008 WL 4840984, at *2-4) (original footnotes renumbered).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court allegedly erred in failing to instruct the jury sua sponte on the defense of unconsciousness;

2. The prosecutor allegedly committed misconduct in his cross-examination of Petitioner and in closing argument; and

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[4] On rebuttal, the prosecution presented evidence that [Petitioner] had initially told police he had thrown the gun on the ground.

3. Petitioner's trial counsel allegedly rendered ineffective assistance, assertedly by: (1) failing to request an instruction on unconsciousness; and (2) failing to call expert witnesses to "assist in substantiating the effects of shock & fear" Petitioner allegedly experienced after seeing Garrett shot.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); see also Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts. . . materially

indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). In

applying these standards, this Court looks to the last reasoned state court decision, here the decision of the California Court of Appeal. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008).

DISCUSSION

I. Petitioner Is Not Entitled to Habeas Relief on His Claim of Instructional Error.

Petitioner's trial defenses were perfect self-defense and imperfect self-defense. The trial court instructed the jury on these defenses (R.T. 366-67, 369-72; C.T. 114-16, 124-25). Petitioner's counsel did not request an instruction on unconsciousness. Petitioner contends that the court should have given such an instruction sua sponte. The Court of Appeal rejected this contention, ruling that the evidence did not support such an instruction, and that any error was harmless (see People v. Doster, 2008 WL 4840984, at *5-6).

"[I]nstructions that contain errors of state law may not form the basis for federal habeas relief." Gilmore v. Taylor, 508 U.S. 333, 342 (1993); see also Estelle v. McGuire, 502 U.S. 62, 71-72 (1991) ("the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief"); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a ground cognizable in a federal habeas corpus proceeding"). When a federal habeas petitioner challenges the validity of a state jury instruction, the issue is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due

process." Estelle v. McGuire, 502 U.S. at 72; Clark v. Brown, 450 F.3d 898, 904 (9th Cir.), cert. denied, 549 U.S. 1027 (2006). The court must evaluate the alleged instructional error in light of the overall charge to the jury. Middleton v. McNeil, 541 U.S. 433, 437 (2004); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997), cert. denied, 522 U.S. 1079 (1998). In challenging the failure to give an instruction, a habeas petitioner faces an "especially heavy" burden. Henderson v. Kibbe, 431 U.S. at 155.

The United States Supreme Court has "long interpreted the standard of fairness [contained in the Due Process Clause] to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984). Under Mathews v. United States, 485 U.S. 58, 63 (1988), a defendant generally "is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." See also Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002), cert. denied, 540 U.S. 963 (2003) ("the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"; (citation and internal quotations omitted).

Failure to instruct on a defense theory can be error only if "the theory is legally sound and the evidence in the case makes [the theory] applicable." Clark v. Brown, 450 F.3d at 904-05 (citations and internal quotations omitted); see also In re Christian S., 7 Cal. 4th 768, 783, 30 Cal. Rptr. 2d 33, 872 P.2d 574 (1994) ("a trial court

need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense"*) (citation, internal quotations and brackets omitted; original emphasis).

In California, "[u]nconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge." People v. Halvorsen, 42 Cal. 4th 379, 417, 64 Cal. Rptr. 3d 721, 165 P.3d 512 (2007) (citations omitted); see Cal. Penal Code § 26, subd. Four ("All persons are capable of committing crimes except those belonging to the following classes: . . . Four -- persons who committed the act charged without being conscious thereof."). "To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist where the subject physically acts but is not, at the time, conscious of acting." Id. (citation and internal quotations omitted). "If the defense presents substantial evidence of unconsciousness, the trial court errs in refusing to instruct on its effect as a complete defense." Id. (citation omitted).

Here, the Court of Appeal determined that the evidence did not suffice to warrant an unconsciousness instruction (see People v. Doster, 2008 WL 4840984, at *5). This Court agrees. The only alleged evidence of unconsciousness upon which Petitioner relies is his own trial testimony that he purportedly "blacked out" and was not "thinking clear[ly]" during the shooting (see R.T. 252, 318). However, Petitioner's testimony concerning the shooting otherwise was quite specific. Petitioner testified that he saw someone run up to Garrett's truck and shoot Garrett in the back of the head (R.T. 245).

Petitioner testified that Petitioner ran behind the In-and-Out, then jogged back to Garrett (R.T. 246-47). Petitioner said he noticed that the parking lot was "pretty much empty" (R.T. 247). Petitioner demonstrated at trial how Garrett assertedly was slumped over in the SUV (R.T. 248-29). Petitioner allegedly told Garret to "hold on" and lifted Garrett slightly, at which point Petitioner allegedly saw the gun (R.T. 249-50). Petitioner said he picked up the gun, heard footsteps behind him seconds later, saw someone coming from the back of the truck, "panicked," and started shooting (R.T. 251). Petitioner said at the time he thought "they" had come back to kill Petitioner (R.T. 251-52). Petitioner said he fired the first shot to protect his life (R.T. 261).

Asked whether he saw the person at whom he was shooting, Petitioner said he "kind of, like, blacked out" (R.T. 252). However, Petitioner did remember the shooting, and admitted pulling the trigger six times (R.T. 252, 266). Petitioner recalled that the person at whom he shot was a few feet away, at the back of the truck (R.T. 252). Petitioner recalled throwing the gun in the back of the truck after he shot it and Petitioner also recalled running away eastbound (R.T. 252-53). He denied putting the gun in the SUV's center console (R.T. 253).

On cross-examination, Petitioner said he was trying to protect his life when he fired the gun (R.T. 261-62). Petitioner said he shot Mabins because Petitioner was "in fear" (R.T. 266). Asked whether he "blacked out," Petitioner said: "I did. I panicked. I was afraid, I mean." (R.T. 263-64). Asked about the shooting, Petitioner said: "It

happened fast. I turned around. I wasn't paying attention, really." (R.T. 265). Asked whether he had the consciousness to pull the trigger, Petitioner responded: "I guess so." (R.T. 265).

As the Court of Appeal recognized (see People v. Doster, 2008 WL 4840984, at *5), except for Petitioner's cryptic statement that he allegedly "blacked out," all other evidence, including Petitioner's own testimony, demonstrated that Petitioner was conscious of his actions at the time of the shooting. In these circumstances, the Court of Appeal did not act unreasonably in concluding that an unconsciousness instruction was unwarranted. See People v. Halvorsen, 42 Cal. 4th at 418 (trial court properly refused unconsciousness instruction, despite defendant's statement to a doctor that defendant did not recall his crimes; defendant's own testimony made clear that he did not lack awareness of his actions during the crimes, where crimes included defendant's acts of "driving from place to place, aiming at his victims, and shooting them in vital areas of the body"); Scott v. Krammer, 2010 WL 1904845, at *37 (E.D. Cal. May 7, 2010) (unconsciousness instruction unwarranted where petitioner testified to details such as identities and positions of those surrounding him, his thought process during the incident, his location, and the directions in which others fled after the shooting).

Furthermore, and in any event, omission of the unconsciousness instruction was harmless under the standard set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993) ("Brecht"). Brecht forbids a grant of habeas relief for a trial-type error unless the error had a "substantial and injurious effect or influence in determining the

jury's verdict." Id. at 637-38. Here, the trial court instructed the jury that, to prove Petitioner committed murder, the prosecution was required to prove malice, and the court defined both express malice (intent to kill) and implied malice (commission of intentional act the natural consequences of which were dangerous to human life, with knowledge that the act was dangerous to human life) (R.T. 368; C.T. 117). The court also instructed the jury that, to find true the intentional discharge enhancement, the jury had to find that Petitioner intended to discharge a firearm (R.T. 375-76; C.T. 239). As the Court of Appeal recognized (see People v. Doster, 2008 WL 4840984, at *6), the jury convicted Petitioner of second degree murder and found the intentional discharge enhancement true, thus necessarily rejecting any notion that Petitioner was unaware of his actions during the shooting. Furthermore, as discussed above, a "significant amount of evidence countered" an unconsciousness theory. See Beardslee v. Woodford, 358 F.3d 560, 578 (9th Cir. 2004), cert. denied, 543 U.S. 842 (2004) (failure to instruct on unreasonable mistake of fact harmless; alleged mistake of fact would not constitute a complete defense, and in any event "a significant amount of evidence countered the mistake-of-fact theory"). Hence, the failure to give an unconsciousness instruction did not have any "substantial and injurious" effect on the verdict. See Brecht, 507 U.S. at 637-38.

For the foregoing reasons, the Court of Appeal's rejection of this claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

II. Petitioner's Claim of Prosecutorial Misconduct Does Not Merit Habeas Relief.

Prosecutorial misconduct merits habeas relief only where the misconduct "'so infec[ted] the trial with unfairness as to make the resulting conviction a denial of due process.'" Greer v. Miller, 483 U.S. 756, 765 (1987) (citation omitted); Bonin v. Calderon, 59 F.3d 815, 843 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996) ("To constitute a due process violation, the prosecutorial misconduct must be so severe as to result in the denial of [the petitioner's] right to a fair trial."). The Court must consider the entire proceeding to determine whether the alleged misconduct rendered the trial so unfair as to violate due process. See Sechrest v. Ignacio, 549 F.3d 789, 807-08 (9th Cir. 2008), cert. denied, 130 S. Ct. 243 (2009).

A. Alleged Misstatements of Evidence

Petitioner contends the prosecutor committed misconduct during the cross-examination of Petitioner (Petition, p. 5). Although the Petition does not identify the specific alleged misconduct, the Traverse asserts that the prosecutor misstated the evidence concerning: (1) whether the victim was moving toward Petitioner at the time of the shooting; (2) whether the victim was lying on the ground when Petitioner allegedly shot him; (3) whether Petitioner "blacked out" during the shooting; and (4) whether Petitioner would have shot anyone who appeared alongside the SUV (Traverse, pp. 13-14). The Court of Appeal rejected these claims, ruling that Petitioner never alerted the trial court that he believed the questioning constituted

misconduct and never sought a curative admonition (People v. Doster, 2008 WL 4840984 at *9). The Court of Appeal also stated that, in any event, the prosecutor's "vigorous cross-examination" did not constitute misconduct. Id.

On direct examination, Petitioner testified that he heard footsteps, saw someone come from the back of the car, panicked, and started shooting (R.T. 251). On cross-examination, the prosecutor asked Petitioner: "You didn't intend to kill the person you were afraid of coming around the corner of that car?" (R.T. 261). Petitioner replied: "I didn't." (R.T. 261). Asked whether he saw the person with a gun, Petitioner said he was not paying attention (R.T. 261). Petitioner said he did not see the person with a knife (R.T. 261). The following occurred:

> [The prosecutor]: So he wasn't making any aggressive moves toward you, right?
>
> [Petitioner's counsel]: Objection. Calls for speculation, Your Honor.
>
> The Court: Sustained.
>
> [The prosecutor]: Did you see him making any aggressive moves toward you?
>
> [Petitioner]: He was coming at me.

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[The prosecutor]: He was coming at you. That's not what you said earlier. You said he came around the corner looking, and you just started shooting.

[Petitioner's counsel]: Objection. Misstates the evidence.

[The prosecutor]: That's not true?

The Court: Sustained.

[The prosecutor]: Your Honor, that's not his testimony before you sustained that.

The Court: Ask your next question.

[The prosecutor]: You saw him coming around the corner and that's when you said you grabbed the gun, or you had the gun in your hand already and you started shooting; right?

[Petitioner]: Yes.

[The prosecutor]: So at no time during your examination by [Petitioner's counsel] did you ever say, "He made an aggressive move towards me"; did you?

[Petitioner]: No.

(R.T. 261-62).

Later, the following occurred:

[The prosecutor]: . . . When he was lying on the ground and you were firing the gun, what were you intending to do then?

[Petitioner's counsel]: Objection. Misstates the evidence.

The Court: Overruled.

[Petitioner]: Laying on the ground -- I don't recall even [sic] shooting while the person was on the ground.

[The prosecutor]: So your testimony is that you blacked out, right?

[Petitioner]: I panicked. I was afraid.

. . .

[The prosecutor]: When a person is lying on the ground lying and you're shooting down at him --

[Petitioner's counsel]: Objection. Misstates the evidence and his testimony.

The Court: I think there's a little conflict here, about what he testified to and what other people testified to.

So overruled. In the scheme of things, I'm overruling the objection and you can reask it.

[The prosecutor]: When you're shooting down at the ground and Mr. Mabins is lying there with no weapons and helpless, how are you in fear for your life at that point?

[Petitioner]: I never -- I never remember shooting Mr. Mabins on the ground. I don't recall that.

Q. How many times did you pull the trigger, Mr. Doster?

A. I don't know.

Q. Well, you heard testimony that the gun was empty, right?

A. Yeah.

Q. Did you pull the trigger all six times?

A. I didn't pull the -- I don't know how many.

Q. Because right now you want us to believe you blacked out?

[Petitioner's counsel}: Objection, Your Honor. Argumentative.

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The Court: Overruled.

[The prosecutor]: Right?

[Petitioner]: I did. I panicked. I was afraid, I mean.

Q. Well, I know that's your excuse right now, but what I want to know is what you felt and what you meant to do when you aimed it at a person and just started pulling the trigger. You didn't even know that that was the assailant, did you?

A. I didn't.

. . .

Q. . . . You pulled that trigger six times; isn't that right?

A. Yes.

Q. And each time you pulled the trigger it was aimed at the person we see lying on the ground there, Mr. Mabins; right?

A. Yes.

(R.T. 263-66).

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Later, the prosecutor asked whether it was fair to say that Petitioner "would have shot anyone who came around the corner there?" (R.T. 299). The court overruled a defense objection that the question allegedly was argumentative (R.T. 299). The following occurred:

> [Petitioner]: At the time I was so afraid and in shock panicked [sic] I might have.
>
> [The Prosecutor]: What do you mean you might have? If the person let's try if the person running around the side there were, let's say, a Caucasian white, but dressed similarly, do you think you would have shot them?
>
> [Petitioner]: I was panicked.
>
> Q. Do you think you would have shot him? Him coming around the back and the whole situation?
>
> A. It's possible.
>
> Q. It's possible?
>
> A. Yeah.
>
> Q. Only possible?
>
> A. I was scared.

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Q. So there is a difference. You would have thought about it?

A. I wouldn't have thought about it.

Q. You would have just done it, that's according to what you're saying?

A. Yeah.

Q. So if this guy ran around -- page 20, or People's 20,[5] not this person, but that man up there appears to be black, blue shirt, blue pants, dark shoes, you would have shot him too?

A. Without -- if he had come around the back of the truck without making his self announced.

Q. So they have to announce themselves?

A. I mean, yeah.

[Petitioner's counsel]: I'm going to object. It's asked and answered. And now it's badgering.

The Court: Sustained.

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[5] People's 20 was a photograph showing an overhead view of the victim surrounded by medical personnel (see R.T. 218).

(R.T. 299-300).

The above-referenced questioning by the prosecutor did not render Petitioner's trial fundamentally unfair. Petitioner admitted that he had not testified during direct examination that Mabins made any aggressive move toward Petitioner (R.T. 262). The questions concerning Petitioner's shooting Mabins while Mabins was on the ground did not misstate the evidence. As the trial court later pointed out (see R.T. 288), Sneed testified that she saw the shooter firing into Mabins while Mabins lay on the ground (see R.T. 136-37). The questions probing Petitioner's testimony that he assertedly had "blacked out" were not improper. See United States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994), cert. denied, 513 U.S. 1100 (1995) (prosecutor's questions and comments not improper where they "did not permit the jury to make any negative inferences beyond those which other evidence already abundantly invited"). The questions concerning whether Petitioner would have shot anyone who came around the SUV were proper attempts to probe Petitioner's contentions that he fired because he was afraid or in a state of panic. See id. As the Court of Appeal reasonably concluded, the challenged questioning did not effect unconstitutional misconduct.

B. Alleged "Argumentative and Disparaging" Comments

Petitioner also challenges some of the prosecutor's questions on cross-examination as "argumentative and disparaging," referencing specifically the following exchange (see Traverse, p. 14):

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[The prosecutor]: You were firing wildly, that's what you want us to believe, right?

[Petitioner's counsel]: Objection, Your Honor. Argumentative.

The Court: Sustained.

[The prosecutor]: You were firing indiscriminately?

[Petitioner's counsel]: Same objection.

The Court: Sustained.

[The prosecutor]: How were you firing, in a panic?

[Petitioner]: In a panic, turned and panic -- turning and firing.

[The prosecutor]: Waving the gun and boom, boom, boom; right?

[Petitioner's counsel]: Objection. Misstates the testimony.

The Court: Stop, Mr. [prosecutor]. That objection is sustained.

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[The prosecutor]: How were you doing it?

[Petitioner's counsel]: Objection. Beyond the scope.

[The Court]: Overruled.

[Petitioner]: Turned and shot.

(R.T. 311).

This Court agrees with the Court of Appeal ruling that the prosecutor's "tough questioning" was substantially "within the prosecutor's proper exercise of his duty to present the case to the jury" (see Respondent's Lodgment 7, p. 20; People v. Doster, 2008 WL 4840984, at *9). Petitioner previously had admitted that he turned around and "just started blasting," and that he pulled the trigger six times (R.T. 266, 287). Although some of the questions were argumentative, in context the questions did not deny Petitioner a fair trial.

C. Alleged Misstatement of Law in Closing Argument

Finally, Petitioner alleges the prosecutor committed misconduct in closing argument and in rebuttal by stating that one must be "facing down the barrel of a gun" to invoke a defense of self-defense (Traverse, p. 14; see R.T. 391, 412). Petitioner's counsel objected on both occasions that this statement misstated the law (R.T. 391, 412). In response to the first objection, the court instructed the

jury that, if the attorneys "strayed a little bit from the law," the jury should remember its instructions, which controlled (R.T. 391). The second time the prosecutor made the challenged statement, in rebuttal, the court overruled the objection (R.T. 412). The Court of Appeal ruled that the court's admonition cured any potential prejudice (see Respondent's Lodgment 7, p. 23).

Assuming arguendo the prosecutor's comments misstated the law, the comments did not deny Petitioner a fair trial. As indicated above, the first time the prosecutor made the challenged comment the court reminded the jury that the court's instructions controlled (see R.T. 391). The court instructed the jury that, if it believed that the attorneys' comments on the law conflicted with the court's instructions, the jury was required to follow the instructions (R.T. 357). The jury is presumed to have followed its instructions. See Weeks v. Angelone, 528 U.S. 225, 226 (2000). The Petitioner has failed to show that the prosecutor's comments denied the Petitioner a fair trial.

D. Conclusion

For the foregoing reasons, the Court of Appeal's rejection of Petitioner's claim of prosecutorial misconduct was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on this claim.

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III. Petitioner's Claims of Ineffective Assistance of Trial Counsel Do Not Merit Habeas Relief.

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Id. at 697; Hein v. Sullivan, 601 F.3d 897, 918 (9th Cir. 2010) (court may dispose of Strickland claim if petitioner "fails to satisfy either prong of the two-part test"). For purposes of habeas review under 28 U.S.C. section 2254(d), Strickland sets forth clearly established Federal law as determined by the United States Supreme Court. See Williams v. Taylor, 529 U.S. at 391 (citation and quotations omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular

case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight. . . ." Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009), cert. denied, 130 S. Ct. 1154 (2010) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Petitioner bears the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (citation and quotations omitted).

B. Discussion

Petitioner contends his counsel provided ineffective assistance, allegedly by failing to request an unconsciousness instruction and by failing to call expert witnesses to "assist in substantiating the effects of shock & fear" Petitioner allegedly experienced after seeing Garrett shot (see Traverse, p. 15). These contentions lack merit.

First, for the reasons discussed above, counsel reasonably could have determined that no substantial evidence supported an unconsciousness instruction, and hence any request for such an instruction would be denied. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997) ("the failure to take a futile action can never be deficient performance"); see also Shah v. United States, 878 F.2d 1156, 1162 (9th Cir.), cert. denied, 493 U.S. 869 (1989) ("[T]he failure to raise a meritless legal

argument does not constitute ineffective assistance of counsel"; citation and internal quotations omitted). Moreover, counsel's failure to request such an instruction did not prejudice Petitioner within the meaning of Strickland.

Second, Petitioner's speculation that an unidentified expert's unspecified testimony could have aided Petitioner is insufficient to show ineffective assistance. See Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (rejecting claim that counsel ineffectively failed to obtain an arson expert, where petitioner "offered no evidence that an arson expert would have testified on his behalf," and "merely speculate[d] that such an expert could be found"); Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation about what an expert would have said is not enough to establish [Strickland] prejudice."). Moreover, in light of Petitioner's detailed testimony concerning the shooting, Petitioner has not shown any reasonable probability that any expert's purported testimony concerning Petitioner's alleged "shock & fear" at the time of the shooting would have produced a different trial result. See Strickland, 466 U.S. at 694.

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RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: August 2, 2010.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.